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No. 462

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

PHILIP HARRY KOOLISH AND SARA ALLEN KOOLISH, INDIVIDUALLY AND TRADING AS STANDARD DISTRIBUTING COMPANY,

Petitioners,

v.

FEDERAL TRADE COMMISSION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

HOMER CUMMINGS,
IRVIN H. FATHCHILD,
Counsel for Petitioners.

CUMMINGS & STANLEY,
Of Counsel.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

The petitioners submit this petition for rehearing and in support thereof respectfully show:

1. The circuit court of appeals has declared the broad and all inclusive position that supplying to or placing in the hands of others the "means" (raffle cards in this case) whereby merchandise may be disposed of on a chance basis

is against "the established public policy of the United States" (R. 119) and that therefore petitioners may be prohibited by order of the Commission (R. 100) and by like decree of the Court (R. 151-153) from distributing through federal channels raffle cards "together with" merchandise or even "separately" therefrom.

2. That position of the circuit court of appeals so declared and applied is in direct conflict with "the established public policy of the United States" clearly manifested by Congress that such "means" *shall not be prohibited* from federal channels and that the extent to which such means are to be used, regulated or prohibited shall be left to the jurisdiction of the several states. (See citations and references in our Petition for Certiorari, p. 14, par. c. and pars. (1), (2) and (3) following.

3. The policy of Congress as thus clearly manifested by it in its regulation of the channels of interstate commerce and the mails is, of course, paramount. (Const., Art. 1, Sec. 8). The federal judiciary may not validly declare and enforce a "public policy" with reference to those channels in conflict with the "public policy" manifested by Congress; and so, in interpreting the indefinite terms of the Federal Trade Commission Act it may not, by resort to its own concepts of what should be the public policy, find an implied intent in the Act in conflict with the established policy and intent clearly manifested by Congress.

4. The Postmaster General, in accordance with the Postal Laws and Regulations which carry out said established policy and intent of Congress *not to prohibit* those "means" from federal channels has with full knowledge of the facts issued and continued in force an official postal permit to distribute these "means" through the mails. (Petition for Certiorari, p. 17). Like permits have been issued to others,

the crucial point of their validity as mailable matter being pointed to by the circuit court of appeals in its decision in *Schreiber* v. *United States,* 129 Fed. 2d 836, quoted in our Petition for Certiorari, p. 17. And yet the instant decision of the circuit court of appeals purports to find in the Federal Trade Commission a delegated power to nullify, in effect, the public policy and statutory authority recognized by the permit so issued by the Postmaster General.

5. There is thus an unresolved conflict between a *judicially* declared "established public policy of the United States" with respect to matters moving in interstate commerce and *Congressionally* determined public policy with respect to such matter; and resulting conflict in purported official action in reliance on those respectively determined but contrary policies.

6. This conflict, we respectfully submit, merits the consideration and determination of this Court because of the inherent public importance of these issues and because of the conflicts in purportedly authorized official action and other consequences resulting therefrom.

7. But beyond all this is an importance of deeper and more general significance. Underlying this controversy, and indeed producing it, is a sociological problem. We are here confronted with the very situation to which this Court alluded in *Patton* v. *United States,* 275 U. S. 199, 205:

> "the public policy of one generation may not, under changed conditions, be the public policy of another."

That there is a manifest recession from the austere prohibitionism in public policy and social practice in the matter of raffles, betting, horse racing and other chance transactions has been recognized by the Illinois Supreme Court in its recent decision quoted in our Petition for Certiorari

(p. 19) and is confirmed by the recent appointment of the British Royal Commission on Lotteries and Betting and by the findings in their report. (See quotations in our Petition, p. 20-21.) As confirmed by said report, here is a social problem which must be faced realistically; and in considering a sound governmental policy, "it is of the utmost importance that not more prohibitions should be made than are absolutely necessary. Every new prohibition creates a new class of potential offenders."

In an analogous problem, the liquor question, we found that even writing a solemn prohibition into the Constitution, and spending millions of dollars endeavoring to enforce it, did not stop or even diminish—some say only increased—the demand for alcoholic beverages. In a short time we had an acute sociological problem. And the repeal of the Eighteenth Amendment followed.

There the Federal judiciary had no responsibility but to apply the Constitution and prohibitions of Congress as expressly enacted. But here the situation is different. Here the prohibitions set forth in the order of the Commission and the decree of the lower court are set forth neither in the Constitution nor in any enactment of the Congress. Whatever prohibitions are to be found in the implications of the Federal Trade Commission Act are, as announced by this Court in many of its decisions, for the final determination of this Court. That responsibility has here been recognized by the granting of certiorari in *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304 and *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349.

In assuming to impose as an established "public policy of the United States" an absolute prohibition upon the supplying of raffle cards through the mail which may or may not be used by the recipients in chance distribution

of merchandise, the courts have embarked on a course of judicial legislation incompatible in general with their true function and at war in particular with the paramount public policy on the subject clearly indicated by Congress.

We submit this Court should not, without more extended consideration than it has heretofore had opportunity to give the subject, commit the Federal judiciary or invite the federal administrative arm to a course of arbitrary experimental prohibitionism in a sea of shifting and uncertain social trends. Such a responsibility is for Congress.

We therefore respectfully submit that the petition for certiorari should be granted in order to permit full consideration and determination of the important issue here involved.

Respectfully submitted,

HOMER CUMMINGS,
IRVIN H. FATHCHILD,
Counsel for Petitioners.

CUMMINGS & STANLEY,
Of Counsel.

Certificate.

Petitioners' counsel hereby certify that this petition is presented in good faith and not for delay. In further evidence of this we certify that we have advised the petitioners to comply with the order and decree below effective as of this Court's denial of certiorari, viz., November 23, 1942, and until the further order of this Court. The clients have assured us that our advice is being followed and we have every reason to believe that that is so.

IRVIN H. FATHCHILD.